Supreme Court, U.S.
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No. 02-1667

IN THE
Supreme Court of the United States

State of Tennessee,

Petitioner,

v.

George Lane, Beverly Jones, and
United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE PRIVATE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.*, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment and thus validly abrogates state sovereign immunity.

2. Whether the Section 5 analysis of Title II should proceed on a facial basis that considers the statute as a whole or should instead examine whether Congress had power to apply the statute to the particular circumstances of this case.

3. Whether Title II is valid Section 5 legislation only when applied to enforce the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
BRIEF FOR THE PRIVATE RESPONDENTS 1
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT 1
REASONS FOR GRANTING THE WRIT 5

I. This Case Implicates The Conflict Over Whether ADA Title II Is Proper Section 5 Legislation 6

II. This Case Implicates The Conflict Over Whether Section 5 Challenges To ADA Title II Must Be Evaluated In A Facial Or An As-Applied Manner 10

III. This Case Presents the Important Question of What Constitutional Violations ADA Title II Must Seek to Remedy in Order Validly to Abrogate State Sovereign Immunity 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases

BE&K Constr. Co. v. *NLRB*, 536 U.S. 516 (2002) 12

Board of County Comm'rs v. *Umbehr*, 518 U.S. 668 (1996) 7

Board of Trustees v. *Garrett*, 531 U.S. 356 (2001) 6, 8, 9

Boddie v. *Connecticut*, 401 U.S. 371 (1971) 12

City of Boerne v. *Flores*, 521 U.S. 507 (1997) 14

Dare v. *California*, 191 F.3d 1167 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001) 11

Doe v. *Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) 7

Faretta v. *California*, 422 U.S. 806 (1975) 12

Garcia v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001) 9, 10, 14

Griffin v. *Breckenridge*, 403 U.S. 88 (1971) 11, 14

Hason v. *Medical Bd.*, 279 F.3d 1167 (9th Cir. 2002), cert. dismissed, 123 S. Ct. 1779 (2003) 9

Kiman v. *New Hampshire Dep't of Corrections*, 301 F.3d 13, vacated on grant of reh'g en banc, 310 F.3d 785 (1st Cir. 2002) 7, 10

Kimel v. *Florida Board of Regents*, 528 U.S. 62 (2000) 13

Klingler v. *Director, Dep't of Revenue*, 281 F.3d 776 (8th Cir. 2002) (per curiam) 9

Kroll v. *St. Charles County*, 766 F. Supp. 744 (E.D. Mo. 1991) 12

Layton v. *Elder*, 143 F.3d 469 (8th Cir. 1999) 12

M.L.B. v. *S.L.J.*, 519 U.S. 102 (1996) 12

Matthews v. *Jefferson*, 29 F. Supp. 2d 525 (W.D. Ark. 1998) 12

Nevada Dep't of Human Resources v. *Hibbs*, No. 01-1368 (May 27, 2003) 8

Olmstead v. *L.C.*, 527 U.S. 581 (1999) 8

Popovich v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir.) (en banc), cert. denied, 123 S. Ct. 72 (2002) ..... passim

Press-Enterprise Co. v. *Superior Court*, 478 U.S. 1 (1986) 12

Reickenbacker v. *Foster*, 274 F.3d 974 (5th Cir. 2001) 9

Romer v. *Evans*, 517 U.S. 620 (1996) 7

Shotz v. *Cates*, 256 F.3d 1077 (11th Cir. 2001) 12

Thompson v. *Colorado*, 278 F.3d 1020 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002) 9, 11

United States v. *Raines*, 362 U.S. 17 (1960) 11, 14

United States v. *Salerno*, 481 U.S. 739 (1987) 11

Walker v. *Snyder*, 213 F.3d 344 (7th Cir. 2000), cert denied, 531 U.S. 1190 (2001) 9

Waller v. *Georgia*, 467 U.S. 39 (1984) 3, 12

Waters v. *Churchill*, 511 U.S. 661 (1994) 7

Wessel v. *Glendening*, 306 F.3d 203 (4th Cir. 2002) 9, 11

Youngberg v. *Romeo*, 457 U.S. 307 (1982) 8

Statutes

42 U.S.C. 12101(a)(3) 9

42 U.S.C. 12131 i

42 U.S.C. 12132 ..... 2, 8

42 U.S.C. 12134 2

42 U.S.C. 12181(7) 8

Americans with Disabilities Act of 1990, 42 U.S.C. 12131 *et seq.* ..... passim

Regulations

28 C.F.R. 35.105 2
28 C.F.R. 35.150(a) 2, 12
28 C.F.R. 35.150(c) 2
28 C.F.R. 35.150(d)(1) 2

Other Authorities

Brief for the United States, *Medical Board of California v. Hason*, No. 02-479 9

BRIEF FOR THE PRIVATE RESPONDENTS

Respondents George Lane and Beverly Jones respectfully acquiesce in the Petition for Writ of Certiorari filed by the Attorney General and Reporter for the State of Tennessee in this cause.

OPINIONS BELOW

The opinions below are correct as presented.

JURISDICTION

The respondents acknowledge the jurisdiction of the court to entertain the petition.

STATEMENT

This case involves the State of Tennessee's failure, in violation of federal law, to conduct proceedings at courthouses that are accessible to individuals with disabilities. The plaintiffs, two Tennessee residents with paraplegia, were denied access to judicial proceedings because those proceedings were held in courtrooms on the second floors of buildings lacking elevators. One of the plaintiffs, Beverly Jones, sought access to those proceedings to perform her work as a court reporter. The other plaintiff, George Lane, was harmed when the state held proceedings in the criminal case in which he was a defendant in the inaccessible second-floor courtroom; *the state arrested him* for failure to appear when he refused to crawl or be carried up the steps. Lane and Jones filed this suit under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. 12131 *et seq.*, to challenge the state's failure to hold proceedings in accessible courthouses.

1. *The Statutory Scheme*—The ADA was signed into law on July 26, 1990, and Title II took effect eighteen months later. See 42 U.S.C. 12131 note. Title II broadly prohibits any "public entity"—including state governments—from "subject[ing]" any "qualified individual with a disability" to

"discrimination." *Id.* § 12132. To give content to that broad requirement, Congress expressly required the Attorney General to promulgate regulations implementing Title II. *Id.* § 12134. The Attorney General's regulations, which became effective January 26, 1992, require public entities to "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a).

Recognizing that this mandate might require states to make physical alterations of buildings, the Attorney General included a series of provisions to accommodate states' need for an orderly transition to compliance. The Attorney General required each public entity, by January 26, 1993, to "evaluate its current services, policies, and practices, and the effects thereof, that do not or may not meet the requirements of this part and * * * proceed to make the necessary modifications." 28 C.F.R. 35.105. Where "structural changes to facilities" were necessary to achieve compliance, the regulations required entities like Tennessee to "develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete such changes." 28 C.F.R. 35.150(d)(1). And "[w]here structural changes in facilities are undertaken to comply" with the accessibility requirement, the regulations provided that "such changes shall be made within three years of January 26, 1992, but in any event as expeditiously as possible." *Id.* § 35.150(c).

2. *The Facts—(a) George Lane*—Respondent George Lane has paraplegia and uses a wheelchair for mobility. Pet. App. 13. In September 1996, Lane was compelled to appear at the Polk County courthouse to answer a set of criminal charges the state had filed against him. Pet. App. 15. Although Title II had been in effect for over four years at that point, the courthouse had not been brought into compliance with the statute's accessibility requirements. Because all proceedings in that courthouse occurred in rooms on the second

floor, and the building had no elevator, Lane was required to leave his wheelchair and crawl up the steps with his hands in order to appear in court. *Id.* Following his arraignment on the charges, Lane was summoned to appear at an October hearing in the same courtroom. *Id.* Lane duly arrived at the courthouse but sent word to the trial judge that he refused to go through the humiliation of crawling up the courthouse steps again, nor would he put his safety at risk by permitting court employees to carry him up the steps. *Id.* On the order of the trial judge, Lane was arrested for failure to appear and taken to jail. *Id.*

Subsequent proceedings in Lane's criminal case occurred in the same inaccessible courthouse. At these proceedings, Lane typically waited at the bottom of the stairs while his attorney shuttled back and forth to the courtroom. Pet. App. 16. As a result, the court conducted proceedings, including discussing the course of future proceedings and the possibility of a change of venue, out of Lane's presence. Lane did have an opportunity to attend his preliminary hearing, which was held in the ground-floor courthouse library, but that location was not generally accessible to the public. Pet. App. 16; cf. *Waller* v. *Georgia*, 467 U.S. 39, 48 (1984) (criminal defendant has constitutional right to public suppression hearing). When an arraignment hearing was called in the second-floor courtroom after the grand jury returned an indictment containing new misdemeanor charges in March 1997, Lane's attorney requested that the court dismiss or at least stay the proceedings until accessible facilities could be provided. Pet. App. 16. The trial court denied that request; the judge ruled that Lane might have a right to bring an independent civil suit to make the courthouse accessible, but that the inaccessibility was no basis for not moving forward with the pending case. See 3/17/97 Tr. 5. The Tennessee appellate courts declined to accept jurisdiction over Lane's request for extraordinary relief. Pet. App. 16-17. Proceedings were subsequently stayed in Lane's criminal case, *id.* 17, and Lane ultimately pleaded

guilty to a single charge of driving on a revoked license after the state added an accessible elevator to the courthouse.

(b) Beverly Jones—Respondent Beverly Jones has paraplegia and uses a wheelchair for mobility. Pet. App. 19. She works as a certified court reporter, but because courthouses in many Tennessee counties are inaccessible, her opportunity to perform her work has been significantly impeded. *Id.* 19-20; see *id.* 22 (listing 23 Tennessee counties in which the courthouses were inaccessible at the time the complaint was filed in this case). She has specifically requested modifications to the courthouses in four Tennessee counties, but none has been made accessible to her. *Id.* 20.

3. Proceedings Below—Respondents brought this suit against petitioner and a number of Tennessee counties under Title II seeking injunctive relief and damages. They sued in their individual capacities and as representatives of a class of persons denied access to the state's courthouses because of their disabilities. The district court declined to dismiss the case on Eleventh Amendment grounds. Pet. App. 6-7.

On petitioner's appeal, the United States intervened. The Sixth Circuit affirmed the district court's judgment on the basis of the *en banc* court's holding in *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, cert. denied, 123 S. Ct. 72 (2002), that ADA Title II validly abrogates the states' sovereign immunity to the extent the statutory violation implicates due process principles. *Popovich* held, however, that the abrogation is invalid to the extent the statutory violation in question instead implicates equal protection principles. As amended on rehearing, the panel's opinion explained that respondents were "seeking to vindicate" their due process "right of access to the courts in Tennessee." Pet. App. 5. The panel left for remand the fact-specific question whether respondents' allegations amount to "due process violations." *Id.*

REASONS FOR GRANTING THE WRIT

The judgment of the Sixth Circuit was correct and should be affirmed. Title II of the ADA—whether considered on its face or as applied to the specific fact setting of this particular case—is a proper exercise of Congress's authority to enforce the Fourteenth Amendment. Accordingly, the district court was correct to deny the state's motion to dismiss, and the Sixth Circuit was correct to affirm that denial.

We agree with the state, however, that this Court should grant the petition for certiorari. The courts of appeals are deeply split over both of the issues presented by the state's petition. On the basic constitutional question, three circuits and a panel of a fourth have held that Title II is, at least in some circumstances, proper Section 5 legislation; five circuits have rejected that conclusion and held that the statute exceeds Congress's Section 5 power. On the facial-versus-as-applied question, two circuits and a panel of a third have held that challenges to the Section 5 basis for Title II must be evaluated in an as-applied manner, while three circuits have held that challenges to the statute's Section 5 basis are necessarily facial in nature. This case squarely implicates both issues that have divided the courts of appeals.

This case furthermore presents the unusual circumstance in which civil litigants' interests lie in acquiescing to certiorari from a judgment under which they prevailed. This Court has granted certiorari to decide the first question presented *three* separate times in recent Terms. Even if this Court were not to review this particular case, it seems all but inevitable that the Court would relatively soon resolve the validity of Title II's abrogation of state sovereign immunity in another case. Proceedings on remand in this case in the meantime under the cloud of uncertainty that hangs over Title II claims against state entities are all but pointless. So long as the state retains the prospect that this Court will vindicate its sovereign immunity claims in some other Title II case, the state will have no incentive to enter into meaningful settlement discus-

sions and every incentive to delay the proceedings in the lower courts for as long as possible.

Moreover, respondents have an important interest in review in this Court because, although the Sixth Circuit's *judgment* is entirely correct, the discussion in that court's opinion reflects an unnecessarily crabbed view of the circumstances in which Title II might validly abrogate state sovereign immunity. In particular, the Sixth Circuit's suggestion that Title II validly abrogates state sovereign immunity *only* when it enforces due process rights and *never* when it enforces equal protection rights may lead the district court to be unjustifiably skeptical of respondents' claims, which rest on a right of access to courts that implicates both due process and equal protection principles. Respondents Lane and Jones accordingly have a strong interest in this Court's prompt resolution of the questions presented by this case.

I. This Case Implicates The Conflict Over Whether ADA Title II Is Proper Section 5 Legislation

In *Board of Trustees* v. *Garrett*, 531 U.S. 356 (2001), this Court held that Congress exceeded its authority under Section 5 of the Fourteenth Amendment by applying ADA Title I to the actions of state governments. However, the Court specifically limited its holding to Title I of the statute (the title that prohibits disability-based employment discrimination) and reserved the question whether Title II (which prohibits disability-based discrimination in the provision of public services) could nonetheless be upheld as a proper exercise of Congress's Section 5 power. See *id.* at 360 n.1; *id.* at 371 n.7. And indeed, the Section 5 basis for Title II is substantially stronger than is the Section 5 basis for Title I.

First, "the scope of the constitutional right at issue," *Garrett*, 531 U.S. at 365, is different. Title I applies to state governments only when they act in their capacity as employers—a context in which the state's decisions are judged only by the deferential rational basis test. See *id.* at 366-368; cf.

Board of County Comm'rs v. *Umbehr*, 518 U.S. 668, 676 (1996) ("'[T]he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.'") (quoting *Waters* v. *Churchill*, 511 U.S. 661, 675 (1994) (plurality)). But Title II much more directly enforces the principle that is "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection"—"the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer* v. *Evans*, 517 U.S. 620, 633 (1996).

Not only does Title II operate broadly to protect individuals with disabilities against being effectively shut out of opportunities to have access to and influence on their state governments, but the statute also applies to a wide range of specific circumstances in which states have obligations to individuals with disabilities that go well beyond the minimal requirement of a rational basis. The fact setting of this case, which involves access to judicial proceedings and public facilities, provides one example. See Pet. App. 3; *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 813-815 (6th Cir.) (en banc) (detailing obligations that the Due Process Clause imposes on states to assure that individuals with disabilities can participate meaningfully in proceedings that adjudicate important rights), cert. denied, 123 S. Ct. 72 (2002). The statute's application to election procedures and voting qualifications,[1] the conditions of confinement of prisoners with disabilities,[2] and the unnecessary institutionali-

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[1] See, *e.g.*, *Doe* v. *Rowe*, 156 F. Supp. 2d 35, 51-59 (D. Me. 2001) (state constitutional provision disenfranchising persons under guardianship by reason of mental illness violates both the Fourteenth Amendment and ADA Title II).

[2] See, *e.g.*, *Kiman* v. *New Hampshire Dep't of Corrections*, 301 F.3d 13, 19-22 (1st Cir.) (failure to accommodate medical, sanitary,

zation of individuals with mental disabilities[3] provide other examples. As this Court recently made clear in *Nevada Department of Human Resources* v. *Hibbs*, No. 01-1368 (May 27, 2003), slip op. 12-13, Congress has substantially greater leeway when, as in Title II, it enforces constitutional principles that involve a "heightened level of scrutiny" of state conduct.

Second, there is a much greater "history and pattern" of violations of the constitutional rights of individuals with disabilities, *Garrett*, 531 U.S. at 368, in the public services context addressed by Title II than in the employment context addressed by Title I. The *Garrett* Court itself recognized that the "overwhelming majority" of examples of state disability discrimination presented to the congressionally created fact-finding task force involved public services. *Id.* at 371 n.7.[4]

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and safety-related needs of prisoner with Amyotrophic Lateral Sclerosis violates both the Cruel and Unusual Punishments Clause and ADA Title II), vacated on grant of reh'g en banc, 310 F.3d 785 (1st Cir. 2002).

[3] Compare *Olmstead* v. *L.C.*, 527 U.S. 581, 587 (1999) (holding that Title II prohibits unnecessary institutionalization of individuals with mental disabilities when, *inter alia*, "the State's treatment professionals have determined that community placement is appropriate") with *Youngberg* v. *Romeo*, 457 U.S. 307, 324 (1982) (institutionalized persons with disabilities have Due Process right to freedom from restraint "except when and to the extent professional judgment deems this necessary to assure such safety or to provide needed training").

[4] The Court suggested that the record of state violations of the constitutional rights of individuals with disabilities might also have related to matters covered by Title III, the ADA's public accommodations title. See *Garrett*, 531 U.S. at 371 n.7. But Title III by its terms covers only "private entities." 42 U.S.C. 12181(7). To the extent that states violated the constitutional rights of individuals with disabilities outside of the employment context, it is Title II that responds to those violations. See *id.* 12132 (Title II provision

And although Congress tellingly omitted any mention of *governmental* employment discrimination from its statutory findings, see *id.* at 371, Congress expressly found that "discrimination against individuals with disabilities persists in such critical areas as * * * access to public services." 42 U.S.C. § 12101(a)(3). Finally, unlike in the employment context, examination of judicial decisions reveals "extensive litigation and discussion of the constitutional violations," *Garrett*, 531 U.S. at 376 (Kennedy, J., concurring), in the public services context. See Brief for the United States, *Medical Board of California* v. *Hason*, No. 02-479, at 1a-8a (listing more than 60 "[c]ases [e]videncing [u]nconstitutional [t]reatment of [i]ndividuals with [d]isabilities").

A number of circuits, recognizing these key distinctions between Titles I and II of the ADA, have held that Title II is, in whole or in part, proper Section 5 legislation. See *Hason* v. *Medical Bd.*, 279 F.3d 1167, 1170 (9th Cir. 2002), cert. dismissed, 123 S. Ct. 1779 (2003); *Garcia* v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98, 111-12 (2d Cir. 2001); *Popovich*, 276 F.3d at 813-16; see also *Kiman*, 301 F.3d at 24 (panel opinion, currently pending on rehearing *en banc*). A number of other circuits, by contrast, have ignored these distinctions and held that Title II was not a proper exercise of Congress's Section 5 authority. See *Wessel* v. *Glendening*, 306 F.3d 203, 215 (4th Cir. 2002); *Klingler* v. *Director, Dep't of Revenue*, 281 F.3d 776, 777 (8th Cir. 2002) (per curiam); *Thompson* v. *Colorado*, 278 F.3d 1020, 1034 (10th Cir. 2001), cert. denied, 535 U.S. 1077 (2002); *Reickenbacker* v. *Foster*, 274 F.3d 974, 983 (5th Cir. 2001); *Walker* v. *Snyder*, 213 F.3d 344, 347 (7th Cir. 2000), cert. denied, 531 U.S. 1190 (2001). This conflict in the circuits is deep and persistent, and this case squarely implicates it. The Court should grant certiorari to resolve the conflict and make clear that Ti-

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broadly prohibiting any public entity from "subject[ing]" a qualified individual with a disability to "discrimination").

tle II is, whether as a whole or as applied here, proper Section 5 legislation.

II. This Case Implicates The Conflict Over Whether Section 5 Challenges To ADA Title II Must Be Evaluated In A Facial Or An As-Applied Manner

This case also directly implicates a second conflict in the circuits. The Sixth Circuit held that even if Title II exceeds Congress's Section 5 authority in some of its applications, the statute must nonetheless be upheld as applied to cases in which individuals with disabilities invoke it to obtain redress for violations of constitutional rights guaranteed by the Fourteenth Amendment's Due Process Clause. Pet. App. 3; see also *Popovich*, 276 F.3d at 811-16 (holding that Title II was a proper exercise of Congress's authority to enforce the Due Process Clause as applied to require that hearing-impaired parent be provided hearing assistance in child custody proceeding). The Second Circuit has similarly employed an as-applied analysis in holding that Title II can be upheld as proper Section 5 legislation when it is applied to cases where the state's action "was motivated by either discriminatory animus or ill will due to disability," even if it cannot be upheld as applied to a case involving a mere failure to provide reasonable accommodation. *Garcia* v. *S.U.N.Y. Health Sciences Center*, 280 F.3d 98, 111-12 (2001). And a panel of the First Circuit has held that Title II may be upheld as proper Section 5 legislation in any case in which the statute is invoked to provide a remedy for an actual violation of the plaintiff's constitutional rights. See *Kiman* v. *New Hampshire Dep't of Corrections*, 301 F.3d 13, 19-22, vacated on grant of reh'g en banc, 310 F.3d 785 (2002).

These holdings accord with the basic rules governing facial challenges to statutes. As this Court has emphasized, a "facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which

the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). The Court has twice applied that principle in the specific context of a claim that Congress has adopted a statute that exceeded the authority to enforce the Civil War Amendments. In both *United States* v. *Raines*, 362 U.S. 17, 20-26 (1960), and *Griffin* v. *Breckenridge*, 403 U.S. 88, 102-07 (1971), this Court held that if Congress had power to reach the specific facts alleged in the plaintiff's complaint, the statute must be upheld as applied to those facts even if the statute might have other applications that went beyond the legislature's enforcement authority. See also *Hibbs*, slip op. 3 (Scalia, J., dissenting) (stating that the *Salerno* principle applies to facial challenges to the Section 5 basis for a congressional enactment).

Disregarding these principles, three courts of appeals have refused to examine the constitutionality of Title II in an as-applied manner. They have instead held that the Section 5 basis for Title II must be established for the statute "as a whole." *Dare* v. *California*, 191 F.3d 1167, 1175-77 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001); see also *Wessel* v. *Glendening*, 306 F.3d 203, 207-08 (4th Cir. 2002) (where plaintiff's claim "arises directly under Title II," rather than under a specific regulation implementing the statute, Section 5 analysis must consider Title II as a whole); *Thompson* v. *Colorado*, 278 F.3d 1020, 1028 n.4 (10th Cir. 2001) (holding that it is appropriate to "conduct the abrogation analysis by considering Title II in its entirety"), cert. denied, 535 U.S. 1077 (2002). The conflict between these decisions and the decisions holding that an as-applied analysis is appropriate is, like the basic conflict over the constitutionality of Title II, widespread and persistent.

This case squarely implicates the conflict over whether Section 5 analysis of Title II should proceed on a facial or an as-applied basis. Unlike some of the Title II cases in which petitions for certiorari have been filed in this Court, cf. *Thompson*, *supra* (plaintiffs challenged the state's imposition

of a $2.25 fee for receipt of a handicapped parking placard), this case involves an application of Title II that directly enforces core constitutional rights. Respondents Lane and Jones contend that the state violated Title II by operating a court system that "when viewed in its entirety" was "not readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). Such an inaccessible court system threatens to violate numerous constitutional rights, including: the First Amendment right of citizens to petition the government for redress of grievances, which encompasses a "right of access to the courts," *BE&K Constr. Co.* v. *NLRB*, 536 U.S. 516, 525 (2002) (internal quotation marks omitted); the First Amendment right of the public to attend court proceedings, see *Press-Enterprise Co.* v. *Superior Court*, 478 U.S. 1, 8-15 (1986); the Sixth Amendment rights of criminal defendants to be present at their trials and to have their trials open to the public, see *Waller* v. *Georgia*, 467 U.S. at 46 (right to public trial); *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975) (right to be present); and the guarantee under the Due Process and Equal Protection Clauses of the Fourteenth Amendment that full and meaningful access to important court proceedings will not be denied because of a litigant's poverty or other constitutionally irrelevant factor, see *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 124 (1996); *Boddie* v. *Connecticut*, 401 U.S. 371, 380-81 (1971). Even if any given individual with a disability who cannot attend a particular proceeding in an inaccessible courthouse might not experience a violation of his or her constitutional rights, the widespread inaccessibility of courthouses throughout the nation[5]—and the significant threat that inaccessibility poses to a range of constitutional rights—fully justifies Title II as "reasonably prophylactic legislation" in

[5] For examples of challenges to inaccessible courthouses, see *Shotz* v. *Cates*, 256 F.3d 1077, 1080-81 (11th Cir. 2001); *Layton* v. *Elder*, 143 F.3d 469, 472 (8th Cir. 1999); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 533-34 (W.D. Ark. 1998); *Kroll* v. *St. Charles County*, 766 F. Supp. 744, 752 (E.D. Mo. 1991).

this context. *Kimel* v. *Florida Board of Regents*, 528 U.S. 62, 88 (2000); see also *Hibbs*, slip op. 15 (reaffirming Congress's prophylactic Section 5 power).

And indeed, the plaintiffs in this case have alleged facts that, if established, would demonstrate that the state actually violated their Fourteenth Amendment rights. Respondents Lane and Jones were denied their constitutional right of access to a judicial proceeding simply because of the state's decision to hold court in inaccessible courthouses. The violation of respondent Lane's constitutional rights went even further, for the inaccessibility of the courtroom denied Lane his right as a criminal defendant to be present at proceedings involving the case against him. And Lane's Kafkaesque arrest for failure to appear at his pretrial hearing—a hearing that was held in an inaccessible second-floor courtroom in a building with no elevator—further deprived him of liberty without due process. This case thus directly presents the question whether Title II can be upheld as proper Section 5 legislation as applied to a case in which the plaintiff challenges state conduct that violated his or her constitutional rights.

III. This Case Presents the Important Question of What Constitutional Violations ADA Title II Must Seek to Remedy in Order Validly to Abrogate State Sovereign Immunity

This case also presents an opportunity to resolve the confusion that persists among those courts that have held that the Section 5 basis for Title II should be evaluated in an as-applied manner. The First Circuit panel held that Title II is proper Section 5 legislation as applied to any case in which the plaintiff challenges conduct that actually violated his or her constitutional rights. See *Kiman*, 301 F.3d at 24. But the Second and Sixth Circuits have artificially limited the circumstances in which the statute can be upheld as applied—though they have done so in different ways. The Second Circuit has ruled that the statute may be upheld only when it is applied to

state conduct that was motivated by "discriminatory animus or ill will due to disability"—conduct that the court believed violated the Equal Protection Clause. *Garcia*, 280 F.3d at 112. The Sixth Circuit, by contrast, has ruled that the statute can be upheld only when it enforces due process—and *not* equal protection—rights. See *Popovich*, 276 F.3d at 811-15.

Those limitations only confuse the issue. A statute must be upheld as proper enforcement legislation whenever Congress had power to reach the facts alleged in the plaintiff's complaint. See *Raines*, 362 U.S. at 20-26; *Griffin*, 403 U.S. at 102-07. Accordingly, Title II must be upheld as applied to any case in which the plaintiff challenges conduct that falls in either of two categories: (a) conduct that actually violated the plaintiff's constitutional rights; or (b) conduct that Congress may regulate to prevent a meaningful risk that constitutional rights will be violated. See *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997) (Section 5 gives Congress power to "remedy or prevent unconstitutional actions").

This case accordingly presents the Court an opportunity both to reaffirm that the ordinary rules governing facial challenges apply to claims that Congress has exceeded its Section 5 authority and to make clear that ADA Title II may be upheld whenever it provides a remedy for the violation of *any* right the Fourteenth Amendment guarantees to individuals with disabilities. The Court should accordingly grant certiorari and affirm the judgment of the Sixth Circuit, but it should not endorse the due process/equal protection distinction that appears in the Sixth Circuit's case law.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

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